No. 11,194

United States Circuit Court of Appeals

For the Ninth Circuit

PACIFIC GREYHOUND LINES, a corporation,
Appellant,

vs.

ZOA H. ZANE and JACK ZANE, her husband,
Appellees.

APPELLANT'S REPLY BRIEF

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Upon carefully studying Brief of Appellees we have arrived at the conclusion that in our Opening Brief we anticipated all arguments made by appellees, and that any effort upon our part to answer appellees' brief would only be a re-statement of our Opening Brief except in the following respect:

We believe it will be helpful to the Court for us to briefly reply to Paragraph VI of the Argument in appellees' brief, said Paragraph VI being captioned

"No notification of rescission or repayment or tender of repayment of the money received for the release was required",

said Paragraph commencing on Page 44 of Brief of Appellees. This is apparently intended to answer Paragraph IV of the Argument in Appellant's Opening Brief, said Paragraph IV being captioned,

"The failure of the plaintiffs to notify defendant of the rescission of the release, and the retention by them of the consideration received for the release after they had knowledge of the true facts estops and bars them from recovery in this case",

which Paragraph commences on Page 45 of Appellant's Opening Brief.

Apparently appellees are attempting to impress upon this Court that appellant's only contention is that notice of rescission and restitution of benefits received *was a condition precedent to appellees' right to bring the action.* That is not true. *Our contention is that the appellees by retaining, using and expending the monies received from the appellant for an unreasonable length of time after the discovery of the alleged fraud ratified the release and appellees are barred and estopped from challenging the same.* If, at the time the appellees brought their action, December 9, 1944, they had tendered to the appellant the amount of monies received by them for the release in question, it would not have altered our contention in the least. This is not a question of *a condition precedent* to the bringing of an action, but is a question of an absolute defense on the merits of the action on the ground of ratification by the appellees.

The case of *Atchison, etc Ry. Co. v. Peterson,* 34 Ariz. 292, 271 Pacific 406, relied upon by appellees is not in point. In the Peterson case there was no evidence whatever

that the plaintiff in that case had retained, used or expended any monies received on account of the release after he discovered the fraud. On the contrary, all that you can gather from the recital of facts is that the plaintiff had expended all monies received on account of the release long before he discovered the fraud. The defendant in the Peterson case contended that merely because the plaintiff brought an action to rescind a release he must tender repayment to the defendant of all monies received on account of the release and that such is a condition precedent to the bringing of the action. The effect of a plaintiff retaining and using monies received on account of a release for an unreasonable length of time after the discovery of fraud inducing the execution of the release was not presented nor mentioned in the Peterson case.

The appellees throughout their brief insist that the execution of the release in question was induced by fraudulent representations, intentional or unintentional, on the part of the appellant, or its agents, to the effect that appellee, Zoa Zane, *had received no injury to her hip and that the only injury received by her was to the lower leg resulting in its amputation.* The evidence is conclusive that appellees discovered the fractured hip and the falsity of the representations in August 1943 (Tr. of Rec. 124, 174). The evidence is conclusive that at the time appellees discovered the alleged fraud on the part of the appellant, they had in their possession a substantial portion of the monies paid to them by the appellant for the release, and thereafter used and expended the same (Tr. of Rec. 288-311). The evidence is conclusive that in October, 1943, the appellee, Jack Zane, telephoned to Dr. Blackman in

Indio and accused him of being responsible for Mrs. Zane's condition (Tr. of Rec. 245-246).

The appellees retained, used and expended the monies until the time suit was brought on December 9, 1944, without any notice to the appellant nor any offer to restore the benefits received by them from the release. This clearly was ratification of the release by the appellees. It must be remembered that the appellees throughout this case have contended that the only reason that they executed the release in question was the fact that they were assured by the appellant and its agents that the only injury received by the appellee, Zoa Zane, was the amputation of her lower leg and she had suffered no injury to her hip. In August, 1943, they discovered that such representations were absolutely false and that she had suffered a fractured hip. Nevertheless, they gave no notice to the appellant, continued to expend and use the monies paid to them by the appellant until they had something less than $200.00 left and then they brought suit. We cannot picture a stronger case of ratification of a contract after the discovery of fraud inducing the execution of the same.

As we have stated we do not deem it necessary to answer any other Argument made by appellees as we consider that we have fully answered the same in our Opening Brief. We merely wish to call the Court's attention that in the Peterson case, supra, the jury was required to give the defendant in that case credit to the extent of $1,000.00 already paid by the defendant to the plaintiff on account of the release. In the present case the Court not only refused to allow the jury to give consideration to the amount paid by the appellant to the appellees for the release, but also refused to allow the

jury to give any consideration to the fact that appellees had retained and expended monies received by them on account of the release after they had discovered the fraud inducing the same.

Respectfully submitted,

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